Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-1087

BARBARA C. HOLMES,

Petitioner,

v.

CHARLES M. DRUMMOND,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF DELAWARE

Barbara C. Holmes, Pro Se
Box 333
Mendenhall, PA 19357
1-215-388-6096
1-215-388-7904

QUESTION PRESENTED

I. Whether appellant/petitioner's rights were denied when appeals court affirmed the decision of the lower court citing that the "newly discovered evidence," which were documents filed without service on her as a party to another action, could have been uncovered before the trial, when, in fact, this should have been declared an extrinsic fraud for it was done by concealment of documents in a collateral case, thus demanding an error at law be reversed?

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NO. _____

BARBARA C. HOLMES,

PETITIONER,

V.

THE STATE OF DELAWARE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

The petitioner, Barbara C. Holmes, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Delaware entered on August 21, 1985.

OPINION BELOW

The Supreme Court of the State of Delaware affirmed the denial of a Motion to Vacate Judgment by the Family Court of New Castle County, Delaware, on 21 August 1985. A copy of same is attached as

Appendix "A."

JURISDICTION

On August 21, 1985, the Supreme Court of Delaware affirmed the denial of petitioner's motion to vacate judgment against her (App. A). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(a).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment V: "[N]or be deprived of . . . property, without due process of law . . . ."

2. United States Constitution, Amendment XIV: "[N]or shall any State deprive any person of . . . property . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the

[1]No other petitioner is involved in this petition.

laws."

STATEMENT OF THE CASE

On January 10, 1984, the Family Court of New Castle County, Delaware, did order a judgment against petitioner. While this was under appeal to the Supreme Court of Delaware, petitioner discovered documents, filed in a collateral case in which she was a party to the action, not having been serviced upon her, which prove both perjury upon the original Court, and intent to defraud petitioner. Such service was mandated by the rules of Civil Procedure. Motions to the above State Supreme Court led to a motion to the lower Family Court to "Vacate Judgment." This was denied by order of February 5, 1985, by the lower Court (Appendix "B"). Upon appeal, the Delaware Supreme Court upheld the denial of the Family Court and this appeal thus

ensued.

REASON FOR GRANTING THE WRIT

Where extrinsic fraud can be maintained, petitioner, by right, has the Court's duty to vacate judgment, otherwise petitioner is denied a basic right of her day in court.

Under Brennan v. Brennan, App., 177 Cal. Rptr. 520 (1981), ruling held that wife, having made prima facie showing of husband's extrinsic fraud was due relief, "i.e., new trial."

Justice demands that she have her day in Court to bring in this formally concealed evidence, meeting all the requirements for newly discovered evidence, and have it considered in the matters under dispute. The only questions before this Court are:

1. Whether this is intrinsic fraud or extrinsic fraud, and

2. Whether, when the evidence was uncovered before final judgment was rendered on appeal, this mandated lower Court to reopen case?

The California Court's decision is in conflict with the Supreme Court of Delaware under Part V this Court's Rules at Rule 171(b).

CONCLUSION

For the foregoing reasons, petitioner, Barbara C. Holmes, respectfully requests that a writ of certiorari issue to review the affirmation of the Supreme Court of the State of Delaware, and entire record of lower Family Court.

Respectfully submitted,

Nov. 20, 1985 Barbara C. Holmes
/s/ Barbara C. Holmes
Barbara C. Holmes, Pro Se
Box 333
Mendenhall, PA 19357

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. _____

BARBARA C. HOLMES,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

TO: Supreme Court of the State of Delaware, The Court House, 55 The Green, Dover, DE 19901
The Family Court of New Castle County, Delawre, 900 King Street, Wilmington, DE 19801
James A. Robb, Esquire, Attorney of Record for Charles M. Drummond, 1211 King Street, Wilmington, DE 19802

NOTICE OF APPEAL

You are all notified that Barbara C. Holmes has taken appeal of denial of her Motion to Vacate Judgment entered in the Family Court of New Castle, Delaware, on February 5, 1985, to the Supreme Court of the United States.

11/20/85
date

/s/ Barbara C. Holmes
Barbara C. Holmes, Pro Se
Box 333
Mendenhall, PA 19357

APPENDICES

BARBARA C. HOLMES (DRUMMOND),

Respondent Below, Appellant,

v.

CHARLES M. DRUMMOND,

Petitioner Below, Appellee.

Nos. 84 & 122, 1985

Family Court of the State of Delaware

C.A. No. 616, 82

Submitted July 29, 1985

Decided Aug. 21, 1985

Before McNEILLY, MOORE AND CHRISTIE, Justices.

ORDER

This 21st day of August, 1985,

Upon due consideration of appellant's pro se opening brief and appellee's Motion to Affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) Barbara C. Holmes ("Wife") and

Charles M. Drummond ("Husband") were married in August, 1979 and later divorced in September, 1981. The Family Court ordered Wife to pay Husband $6,453.64 as his share of marital assets. Wife was to pay said amount by March 1, 1984 or in monthly installments over a two-year period commencing March 1, 1984. To guarantee the paymetns, the Court ordered Wife to execute a mortgage, in favor of Husband, on her nonmarital real estate. Wife refused to execute the mortgage and the Family Court found her in civil contempt. Wife appeals the Family Court's order and finding of civil contempt.

(2) Wife contends that the Family Court abused its discretion when (1) it refused to grant her motion, based upon newly discovered evidence, to vacate its judgment, (2) it failed to grant her a

continuance. Wife also contends that the Court had no statutory authority to order the execution of a mortgage on nonmarital property and that the nonmarital property in issue here is protected from a mortgage by a prenuptial agreement. Pursuant to Supreme Court Rule 25(a), Husband filed a Motion to Affirm the Family Court.

(3) The newly discovered evidence that Wife claims supports her motion to vacate the Order pursuant to 13 Del.C. §1519 and Superior Court Civil Rule 60(b), is certified records from the Court of Common Pleas of Chester County, Pennsylvania concerning a mortgage foreclosure proceeding on property she jointly owned with Husband. The Court rejected Wife's motion, reasoning that the records were accessible to the public and could have discovered with due

diligence. The decision to grant a motion pursuant to Superior Court Civil Rule 60(b) is within the discretion of the trial judge. Wife B. v. Husband B, Del. Supr., 395 A.2d 358 (1978). We cannot say the trial judge abused his discretion here.

(4) We also find no abuse of discretion in the Trial Court's refusal to grant Wife's requested continuance of her contempt hearing. Wife requested a continuance so she could present evidence relating to her ability to pay. The Court reasoned that her ability to pay was irrelevant to her failure to execute the security document.

(5) Wife contends that the Court had no authority to order a mortgage on her nonmarital real estate. The Court clearly has the power to order the mortgage pursuant to 13 Del.C. § 1513(f)

which provides:

> The Court may order a party to execute and deliver any deed, document or other paper necessary to effectuate an order entered under this chapter ... .

(6) Wife points out that the Family Court ordered that a lien be placed against her separate premarital asset, and she contends that such property is protected by a prenuptial agreement from the imposition of a mortgage to secure the financial obligation imposed upon her by Family Court as a result of the division of marital assets. This argument is without merit. The prenuptial agreement stated, among other things, that the property in question is not a marital asset, and thus, it would not be subject to division among the parties were the marriage to be dissolved. The agreement also provided that, in effect, each party gave up any

direct claims they had (as a marriage partner) against the other's property. The non-marital asset, however, remained in other respects the ordinary property of the Wife, and it was otherwise subject to court order. The property is not judgment proof, and it remains subject to possible seizure (or the imposition of a creditor's lien) to satisfy a judgment creditor. The property was liened for Husband as a creditor and not because he had some inherent right to that property as a marital asset. It matters not that the creditor happens to be the former Husband, and that the debt happens to arise from the division of marital assets which the Wife had already received.

(7) It is manifest on the face of Wife's brief that her appeal is without merit. As to the issues raised posing questions of law, they are clearly

controlled by settled Delaware law. There was no abuse of discretion by the Family Court.

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rule 25(a), that the judgments of the Family Court be, and they hereby are,

AFFIRMED.

BY THE COURT:

/s/ John J. McNeilly
Justice

THE FAMILY COURT OF THE STATE OF DELAWARE

FEBRUARY 5, 1985

Barbara C. Holmes
Box 333
Mendenhall, PA 19357

James A. Robb, Esquire
1211 King Street
Wilmington, DE 19801

RE: Drummond v. Drummond
File No. 616, 1982

Dear Ms. Holmes and Mr. Robb:

I acknowledge receipt of the Motion filed by Barbara C.Holmes, formerly Barbara C. Drummond to vacate my Order of January 10, 1984. The Motion is based upon newly discovered evidence.

Modification of proeprty disposition are governed by 13 Del.C. § 1519(3) which provides as follows:

> (a) A decree . . . . of this title may be modified or terminated only as follows:
>
> > (3) Property disposition, only upon a showing of circumstances that would justify the opening or vacation of a judgment under the rules of the Superior Court of this State.

The applicable Superior Court rule to which the above statute refers as Civil Rule 60 (b) which provides in pertinent part:

(b) **MISTAKE, INADVERTENCE; EXCUSABLE NEGLECT, NEWLY DISCOVERED EVIDENCE, FRAUD, ETC.**

On Motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

(2) newly discovered evidence which by due diligent could not have been discovered in time to move for a new trial under Rule 59(b).

Mrs. Holmes alleges that the newly discovered evidence would justify the vacation of this Court's Order are certified records from the Court of Common Pleas of Chester County concerning a 1983 mortgage foreclosure proceeding. Since these records are of a public nature and could have been easily presented at the time of the property division hearing, it cannot be said tht they could not have been discovered by due diligence at the time of the proeprty division trial. This evidence cannot form the basis for a vacation of the Order of this case.

The Motion to Vacate is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ Jay H. Conner
JAY H. CONNER
Judge

AFFIDAVIT OF SERVICE

I, Barbara C. Holmes, affirm that I have made service on the above parties personally by leaving three (3) copies of this Notice of Appeal with each.

Barbara C. Holmes

11/20/85
date

/s/ Barbara C. Holmes
Barbara C. Holmes, Pro Se
Box 333
Mendenhall, PA 19357

The undersigned, Clerk of the Court, above named, hereby signifies acknowledgement of service of the foregoing Motion.

11/20/85
date

/s/ Stephen D. Taylor for
Andrew T. Horsey, Esquire
Clerk, Supreme Court of Delaware

Note-when presented the three copies, the clerk below accepted but refused to acknowledge service. BCH

date

Clerk of Family Court of New Castle County, Delaware

The undersigned, Attorney of Record, for above-named Charles M. Drummond, hereby signifies his acknowledgement of

service of the foregoing Motion.

Note-when service was attempted personally, as per above,it was found this attorney had moved his office. Service therefore will be by mail with notice to forward. E.C.H

date

James A. Robb, Esquire
1211 King Street
Wilmington, DE 19802

Sworn to and subscribed before me this

_____ day of November, 1985.

Notary

AFFIDAVIT OF SERVICE

I, Barbara C. Holmes, affirm that I have made service on the above parties personally by leaving three (3) copies of this Notice of Appeal with each.

11/20/85
date

Barbara C. Holmes
Barbaral C. Holmes, Pro Se
Box 333
Mendenhall, PA 19357

The undersigned, Clerk of the Court, above named, hereby signifies acknowledgement of service of the foregoing Motion.

11/20/85
date

Stephen D. Taylor for
Clerk of Supreme Court of Del.
Andrew T. Horsey, Esquire

Note - when presented the three copies the Clerk below accepted but refused to acknowledge service
date

Clerk of Family Court of New Castle County, Delaware BC #

The undersigned, Attorney of Record, for above-named Charles M. Drummond, hereby signifies his acknowledgement of service of the foregoing Motion.

Note - when service was attempted personally as per above, it was found this attorney had moved his office
date

James A. Robb, Esquire
1211 King Street
Wilmington, De 19802

Service therefore will be by mail with notice to forward.

Sworn to and subscribed before me this ____ day of November, 1985.

Notary